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Case Law of the European Court of Human Rights in Decisions of the Constitutional Court of Georgia

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ABSTRACT

The article deals with the problem of using the European Court of Human Rights (ECtHR) case law by the Constitutional Court of Georgia. For this purpose, the place of the international treaty in the hierarchy of the legal system of Georgia is first reviewed, whereby it is shown that this issue lies in a gray area. In addition, decisions of the Constitutional Court of Georgia are analyzed, where it is found that in their decisions, the ECtHR case law is rarely interpreted. It is also found that since 2012, the Constitutional Court of Georgia has not interpreted the European Convention on Human Rights and Fundamental Freedoms or the ECtHR case law at all, even though in many cases at least one side used the ECtHR case law in its argument. In such cases, it seems the Constitutional Court of Georgia would simply state the position of the party but not indicate its own opinion - whether the court shared it or not, or why.

Introduction

The Constitutional Court of Georgia (CCG) was created by the Constitution of Georgia of 1995. Other branches of the government, with greater or less restricted powers, were seen in the times of the USSR, but we cannot say this about the Constitutional Court: there was no such body in the Soviet system. Thus, the CCG, like the constitutional courts of post-soviet countries, is a new body.

On the one hand, it is very good to have a new body, especially for a post-Soviet country, because it is free from the burden of the country's "dark past". As Arnold said: "The creation of constitutional courts was the initial sign of the dawning of a new era in constitutional thinking, and not a continuation of the past" (Arnold, 2003). This is the reason that trust in the CCG is much higher than in ordinary courts of the country.

On the other hand, however, there are some issues with the CCG: it does not have

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the experience or tradition behind it that constitutional courts in Western European countries have, and that is why we can see inconsistent approaches to some issues in the decisions of the CCG. One such issue is the use of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the Case Law of the European Court of Human Rights (ECtHR). The purpose of this article is to demonstrate the practice of the CCG in this regard.

1. The Place of International Treaties among the Hierarchy of Normative Acts in Georgia

Georgian legislation recognizes international treaties as a part of Georgia's domestic law. Therefore, "a necessity of the establishment of norms with preceding legal validity comes from the international treaty and other normative acts existing throughout the country" (Korkelia, 1998).

Yet, the placement of international treaties among the hierarchy of normative acts in Georgia is unclear. According to Paragraph 5 of Article 4 of the Constitution of Georgia, "The legislation of Georgia shall comply with the universally recognized principles and norms of international law." This establishes that international treaties hold third place among the hierarchy of normative acts, after the Constitution of Georgia (including constitutional laws) and constitutional agreement.

The second sentence of Article 8 of the Constitution of Georgia is also unclear with regards placement in the hierarchy. According to it, "the relationship between the state of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia shall be determined by a constitutional agreement[1], which shall be in full compliance with the universally recognized principles and norms of international law in the area of human rights and freedoms." So, the given norm says that even though the constitutional agreement is the highest after the Constitution of Georgia, it also means that it is above international treaty, and should comply with norms of international law in the field of human rights and freedoms. This is what makes it unclear: how should a superior norm comply with an inferior one? The principle of the hierarchy of norms means that an inferior norm should comply with a superior one, right?

It could be argued that it is not about international treaties, but only about "universally recognized principles and norms of international law in the area of human rights and freedoms". But we would disagree, as "it is impossible for internationally recognized fundamental rights and principles to stand separately: they should be placed under international legal acts" (Gegenava, 2018). So, the human rights principles recognized by international law are stated by, or come from, international treaties. It is confirmed also that, according to the Constitution of Georgia, constitutional agreements should comply not only with principles recognized by international law in the field of human rights and freedoms but also with the norms. A specific legal act includes a norm, in this case – an international trea-

[1] The Constitutional agreement is signed by the President of Georgia and the Patriarch of the Apostolic Autocephalous Orthodox Church of Georgia. It determines the relationship between the State of Georgia and the Apostolic Autocephalous Orthodox Church of Georgia. Other religions do not have such an agreement with the Georgian state.

ty. So, compliance with principles and norms recognized by international law means compliance with international treaties.

It could be assumed that in the given regulation ("the constitutional agreement shall be in full compliance with the universally recognized principles and norms of international law in the area of human rights and freedoms"), the regulation on human rights represents a specified legal act. This means that the constitutional agreement does not comply with each international agreement, but only with international treaties existing in human rights and freedoms. Even this cannot be taken as a relevant argument, because, first, it is difficult to find an international agreement that is not about human rights; secondly, Article 4 of the Constitution of Georgia simply defines that an international treaty should comply with the constitutional agreement. It means that all norms of each international treaty should comply with the constitutional agreement.

Accordingly, only one conclusion can be made: the second sentence of Article 8 of the Constitution of Georgia contradicts Paragraph 5 of Article 4. Therefore, it contradicts the principle of the hierarchy of norms.

At a glance, "the legal outcome of this collision is negligible. If the constitutional agreement 'should totally comply with' the universally recognized principles and norms of human rights and freedoms, if there is a compliance of norms with a constitutional agreement, then the universally recognized principles and norms of human rights and freedoms should get priority" (Korkelia, 2004) - though such an assertion is incorrect, because it contradicts Paragraph 5 of Article 4 of the Constitution of Georgia, which says that if there is non-compliance between the constitutional agreement and an international treaty, the priority will go to the constitutional agreement (Korkelia, 2004). This, then, contradicts the legal state principle and has a negative effect on the Constitution, as the highest authority of law.

Despite the attitude toward international treaties and the constitutional agreement being unclear, according to the second sentence of Paragraph 5 of Article 4 of the Constitution of Georgia, an international treaty recognized in Georgia shall take precedence over domestic normative acts. Accordingly, each national law or normative act should comply with an international treaty.

2. The Practice of the Constitutional Court of Georgia

International treaties, including the ECHR, are part of the Georgian legislation. This means that the court should use them during court proceedings and case law. The Constitutional Court, along with the ECHR, should also interpret the case law of the ECHR to explain the regulations of the ECHR.

The ECHR is quite a "dry" document, but the case law of the ECtHR enriches this regulation, explains the legal interpretation of the ECHR, and establishes the possibility of its use in specific circumstances (Korkelia, 2002).

Georgia joined the ECHR on April 27, 1999, and the Parliament of Georgia ratified it on May 20, 1999, seeing it come into immediate effect (Chart of signatures and ratifications of Treaty 005). From this moment, it became applicable for the CCG to use the ECHR and the case law of the ECtHR. Interesting is the fact the Constitutional Court interpreted and established the ECHR in its decision in 1996, before

Georgia joined formally the ECHR: in the case of law "Aleksandre Danelia and Giorgi Tsomaia v. the Parliament of Georgia", the Court cited the first protocol to the ECHR while making the decision (Judgment N1/2-14-19, December 30, 1996).

After joining the ECHR, the first decision made by the CCG, which mentioned the Precedent Law of the ECtHR, was a judgment made on January 25, 2000, in case law "Lela Instkirveli and Ekaterine Chachanidze v. the Parliament of Georgia" (Judgment N1/1/107, January 25, 2000). According to the decision, the complainants requested recognition of Paragraph 3 (v) of Article 8 of the Tax Code of Georgia as unconstitutional towards the first paragraph of Article 21 (the right to property and heritage) of the Constitution of Georgia (the version of that time). The applicants argued that the notary activities of a private individual belonged to non-commercial economic activity, and that is why considering it as an economic activity, and therefore justifying taxation of that notary for economic activity with the applied tax, contradicted the abovementioned norm of the Constitution. The complainants, to make their arguments steady, mentioned a decision made by the ECtHR on October 23, 1990: case law Darby v. Sweden (Application no. 11581/85). They also pointed to the first article of the first protocol to the ECHR, which defends the property right. The Court did not satisfy the complainants' plea, though it never mentioned either the ECHR or the ECtHR in the motivation part of its decision.

In 2002, a growing interpretation of the ECHR by the CCG was noticeable, where the Constitutional Court interpreted the ECHR just twice before 2002, that year it used the ECHR three times (Korkelia, 2007), but only one was interpreted in a decision (Judgment N1/2/178, April 26, 2002).

In 2003, the Constitutional Court pointed to the case law of the ECtHR in the motivation part of five decisions (Judgment N2/2/167-202; Judgment N2/3/182,185,191, January 29, 2003; Judgment N2/6/205,232, July 3, 2003; Judgment N2/7/219, November 7, 2003; Judgment N1/5/193, December 16, 2003). Of the five decisions made in 2003, the one delivered on case law "The Citizens of Georgia – Olga Sumbatashvili and Igor Khaprov v. the Parliament of Georgia" needs highlighting. In that case, the complainants requested that the Constitutional Court recognize Section 4 of Article 426 of the Civil Procedure Code of Georgia as unconstitutional, according to which "applying to renew the court proceedings is inadmissible after five years once the decision comes into force, due to the declaration of a court decision being invalid and new circumstances being apparent". The Constitutional Court did not satisfy the mentioned lawsuit, although Judge Iakob Phutkaradze did not agree with the decision and presented a dissenting opinion. In his dissenting opinion, the motivation part is bigger in extension than the court decision; the judge states that, while making the decision, "Article 6, 'the right to a fair trial' of the ECHR, should have been considered". This is what the judge says v. the argument of "case immortality" – it is possible "that the court won't review the application if it decides that it is obviously baseless, or if applying to court is inappropriate - this is the way the European Court of Human Rights acts" (Judgment N1/3/161, April 30, 2003).

In 2004, the Constitutional Court used the ECHR, along with six decisions (Judgment N2/1/241, March 11, 2004; Judgment N 1/3/209,276, June 28, 2004; Judgment № 2/3/250-269, July 9, 2004; Judgment N1/4/212, August 3, 2004; Judgment N1/5/224, November 16, 2004; Judgment N 2/6/264, December 21, 2004) out of its twelve decisions, and pointed directly at the precedent case law of the ECHR in four decisions. One case should be highlighted – "Citizen of Georgia Anzor Tevzaia v. the Parliament of Georgia". In this case law, a complainant requested recognition of the 2nd and 8th paragraphs of the resolution on Ratification First Protocol to the ECHR of the Parliament of Georgia, of 27th December 2001, unconstitutional towards Article 14 (the right of equality), the 1st paragraph of Article 21 (the right to property and heritage), Article 39 ("other rights") and the 1st paragraph of Article 42 (the right to apply to the court) of the Constitution of Georgia (the version of that time). Disputable norms included a regulation that did not apply to internally displaced persons from the regions of Abkhazia and Tskhinvali (currently occupied territories), and Georgia was not responsible for breaching the regulations of the First Protocol of the ECHR by self-declared, unauthorized entities on the above-mentioned territories[2]. It should be noted that the judges' votes were divided. The court reviewed widely precedent cases of the ECtHR, especially "Ilaşcu and Others v. Moldova and Russia" (Application no. 48787/99, 08.07.2004), "Asanidze v. Georgia" (Application no. 71503/01, 08.04.2004), and "Matthews v. the United Kingdom" (Application no. 24833/94, 18.02.1999).

In the following years, the practice of interpretation of the ECHR and the ECtHR case law in the total number of CCG decisions fluctuated between 25% and 80% throughout each calendar year.

The mentioned tendency has changed since 2012 when the Constitutional Court did not use the ECHR and case law of the ECtHR practice in the four decisions it made that year. The Constitutional Court only mentions once the ECHR in the motivation part of its decision (Judgment №3/1/512, Jun 26, 2012).

In 2018 and 2019, the Constitutional Court used neither the ECHR nor the case law of the ECtHR in any of its decisions (32 judgments and 79 rulings).

A pre-verdict of the pre-session is the only one of the Constitutional Court Acts of 2018 that did not make a case for consideration. While reviewing the pre-verdict, the Constitutional Court pointed at two decisions made by the ECtHR ("Kokkinakis v. Greece" (Application no. 14307/88, 25.05.1993) and "Sunday Times v. the UK" (Application no. 6538/74, 26.04.1979)). It also used the definitions of the decisions about crime regarding norm foresight and law accessibility (Ruling №1/6/1292, October 19, 2018).

According to most of the Constitutional Court's decisions, the parties point to the practice of the ECtHR to strengthen their arguments, and this is also mentioned in the subsequent decisions. Yet the CCG, in not considering the above-mentioned pre-verdict, does not discuss the arguments of any parties in its decision, and, therefore, it never mentions the ECtHR.

[2] See the resolution of the Parliament of Georgia "on Ratification of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms", December 27, 2001.

Such an attitude, seeing a party using the case law of the ECtHR as an argument, and yet the court does not reply to it in any of its decisions, was noted for the first time in the case "Lela Intskirveli and Ekaterine Chachanidze v. the Parliament of Georgia" (Judgment N1/1/107, January 25, 2000), as already discussed. Such an incident has been seen not just once, though it has been actively settled since 2012.

It is also noteworthy that the CCG does not discuss the party's argument even when it makes a decision against them. For example, in the judgment made on December 7, 2018 (Judgment №2/8/765, December 7, 2018), it is noted that the defendant party, in order to strengthen its argument, uses the practice of the ECtHR, among other practices. The court satisfied the lawsuit partially, though it never answered the defendant party's argument regarding the practice of the ECtHR, even though the argument in the lawsuit was about fair trial and defending rights, in which the ECtHR has rich practice.

It is interesting that the Constitutional Court refrains from discussing the case law of the ECtHR even when the parties, the complainant and defendant, use the practice of the ECtHR to strengthen their arguments. A discussion was made on the case "NE(NC)LP[3] "Phrema" v. the Parliament of Georgia" (Judgment №2/8/734, December 28, 2017) of December 28, 2017, which is the best example of this scenario. In this case, both parties (applicant and respondent) pointed to the relevant case law of the ECtHR to strengthen their position, but the court did not discuss said case law. However, it was no singular event, as we can find the same approach in other cases: Judgment N1/5/1472, June 17, 2022; Judgment N1/8/926, November 4, 2022; Judgment N1/9/1673,1681, November 17, 2022; and Judgment N1/4/693,857, June 7, 2019.

From the case law of the Constitutional Court, declared in 2018, the case "LEPL[4] Evangelical-Baptist Church of Georgia", LEPL "Evangelical-Lutheran Church of Georgia", "LEPL Supreme Religious Administration of Muslims of All Georgia", LEPL "Redeemed Christian Church of God in Georgia" and LEPL "Pentecostal Church of Georgia" v. the Parliament of Georgia" should be mentioned (Judgment №1/1/811, July 3, 2018a). The Constitutional Court again did not use the practice of the ECHR in its decision, although Judge Eva Gotsiridze stated her dissenting opinion, and in so doing used the definitions of the ECtHR regarding discrimination. In her dissenting opinion, she stated: "It would be desirable for the court to establish well-settled principles or definitions in the field of discrimination, in practice; also to establish a logical chart of discrimination, [such as that] which has recently been used worldwide in the European Court of Human Rights" (Judgment №1/1/811, July 3, 2018b).

To more broadly understand Judge Gotsiridze's expression: it would be better for the CCG to establish such a practice not only in the field of discrimination.

In 2020, there was one ruling where the CCG interpreted the ECHR, in particular Protocol 4, and one decision where the ECtHR was mentioned (Ruling N1/1/1404, June 4, 2020). In the ruling, one of the matters of argument was that Article 180 of the Criminal

[3] NE(NC)LP – Non-Entrepreneurial (Non-Commercial) Legal Person.

[4] LEPL – Legal Entities under Public Law.

Code of Georgia contradicted the first sentence of Article 31(9) of the Constitution of Georgia ("no one shall be held responsible for an action that did not constitute an offense at the time when it was committed") and Article 1 Protocol No. 4 to the ECHR. In this ruling, the CCG indicated that it was empowered to assess the issue of the compliance of Georgian normative acts only with the Constitution of Georgia. With this in mind, the issue of assessing the compliance of the disputed norm with the ECHR is not a matter for the CCG (Ruling N1/4/1416, April 30, 2020).

In the second case, the plaintiffs argued that the electronic ID was contrary to their religious beliefs and demanded that it be optional. The court dismissed the claim, stating that it could not be considered as "interference" with freedom of belief/ religion by the state. In the decision, the CCG cited one sentence from Skugar and Others v. Russia (no. 40010/04, ECHR, 3 December 2009) that "the convention organs have consistently held that general legislation which applies on a neutral basis without any link whatsoever with an applicant's personal beliefs cannot in principle be regarded as an interference with his or her rights under Article 9 of the Convention" (Ruling N1/1/1404, June 4, 2020).

In the last two years (2021-2022), the CCG interpreted the ECtHR`s case law only once, in the case of the Public Defender of Georgia v. the Minister of Justice of Georgia (Judgment N1/10/1676, December 21, 2022). The case dealt with a prisoner who had been placed in solitary confinement for an extended period. The CCG took a broad interpretation of the ECtHR's case law when deciding on the issue.

3. The Need to Interpret the ECHR

One should ask, what is the rank of necessity for the Constitutional Court to interpret the ECHR or use the case law of the ECtHR? According to Georgian legislation, the Constitution is a supreme law, and the Constitutional Court is a court of constitutional control. As such, the Constitutional Court should not go beyond the Constitution, as its field of jurisdiction is mainly within the confines of that Constitution.

Of course, applying the ECHR and the case law of the ECtHR is not a dogma. Generally, the rule of a national court taking into consideration the ECHR and its case law is important if the court decides it would be impossible to make a decision without using the ECHR. In other words, the legal effect of the use of the Convention is greater if the Court provides the protection of human rights by a higher standard than would be provided only based on a domestic normative act (Korkelia & Kurdadze, 2004).

It is important to apply the ECHR and the case law of the ECtHR when one of the parties highlights them during the court process. Scientists quite rightly point out that if a party uses the ECHR and the case law of the ECtHR to strengthen its position, the national court should analyze the case according to these arguments; it should not disregard them. The court, in its decision, might neglect the mentioned arguments, support them, or reject such definition of the norm of the ECHR used by the party according to the ECHR. Further, the point of view of the party of the explanation of the norms might be quite different from the court's explanation. Yet, in its decision, the court should

express its position: is it possible to use the ECHR and the case law of the ECtHR in a specific dispute, and it should explain why it is applying or not these norms in its decision making (Maruste, 2000).

The above-mentioned refers to the courts of jurisdiction, as well as to constitutional courts. The constitutional court practice of European countries also confirms it. For example, the Federal Constitutional Court of Germany stated in one of its decisions that, while explaining the Federal Constitution, the plot of the ECHR and state of development should be considered. The court also stated that the case law of the ECtHR means the determination of the plot and burdens in the Constitution (Korkelia, 2007).

The constitutional courts of Italy have the same attitude. Since the constitutional reform of 2001, most of the decisions consist of notations about the ECHR (Nastić, 2015a), while the case law of the ECtHR influenced the court system of Spain and became the basis of more than five hundred Constitutional Court decisions in the country. The Constitutional Court of Spain often cites the ECHR, having noted numerous times that the ECHR usually plots constitutional rights, essential when defining those rights (Nastić, 2015b).

The Constitutional Court (Arbitrage) of Belgium, as well as the Council of State, explains the regulations of its constitution according to the ECHR. Moreover, while making interpretations of constitutional rights, the Council of State usually refers to the Precedent Law of the ECtHR (Gerards & Fleuren, 2014).

The development of the practice of the CCG itself, or the fact that the judge is limited only by the constitution, are no arguments for the CCG's lack of practice in interpreting the ECtHR`s case law.

At this point, it is an inconceivable tendency that the CCG does not use the ECHR and the case law of the ECHR in its decisions. Such an attitude cannot be justified when the party explains its request based on the norms of the ECHR and its case law- the law directly requires it. That is, according to Paragraph 1^4 (c) of Article 43 of the Organic Law of Georgia "on the Constitutional Court of Georgia", "motives, which are used by the Constitutional Court to neglect an opposite opinion or statement" should be mentioned in the motivation part of the Constitutional Court decision or conclusion. So, the court is obliged to use the ECHR and the Precedent Law of the ECtHR in the above-mentioned cases. Otherwise, it is a violation of the law.

The development of the practice of the CCG itself, or the fact that the judge is limited only by the constitution, is not an argument in favor of such a lack of practice of interpreting the case law of the ECHR (Gegenava, 2022).

Ideally, the CCG should use comparative case law. This would significantly improve the quality of the content, justification, and legal technique going into the decision itself, as well as increase public confidence in the court (Gegenava, 2022).

Conclusion

The CCG has a very bad practice of using the case law of the ECtHR. In fact, in recent years, the CCG has not interpreted the case law of the ECtHR in its decisions at all, which does not shine positive light on the constitutional control body of Georgia. Of course,

interpretation of the ECHR and the case law of the ECtHR is not mandatory for the Constitutional Court in every decision. However, it would be better for the CCG to apply the case law of the ECtHR when the latter offers a higher standard of protection of human rights than exists in Georgia. In addition, when a party or parties involved in a CCG trial use the case law of the ECtHR to strengthen their position, the Constitutional Court is obliged to interpret the case law of the ECtHR. Otherwise, the decision of the Constitutional Court cannot be considered sufficiently justified.

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